Gen. Crawford
With the Compliments of
William Whiting

MILITARY ARRESTS

IN

TIME OF WAR.

BY

WILLIAM WHITING.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1863.

ASSOC.
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CONTENTS.

	Page.
Arrests in loyal States regarded with alarm	5
Right of freedom from arrest claimed by public enemies	6
Civil war changes our liberties	6
General war powers of the President	7
Martial law is the law of war	9
Foundation of martial law	9
The extent of the means of war as shown by the necessities of war and its objects	11
Powers and responsibilities of military commanders	11
Arrests on suspicion	13
Abuse of power of arrest	14
Safeguards	14
Effect of war upon courts and of courts upon war	15
Military arrests are not forbidden by the Constitution	17
Arrests without warrant	18
Objection that arrests are made without indictment	20
The Constitution sanctions military arrests	23
Military powers may be delegated	25
Obedience of orders is justification	26
Officers making arrest not liable to civil suit or criminal prosecution	26
Arbitrary power not consistent with constitutional or free governments	27
True meaning of "arbitrary" as distinguished from "discretionary"	28
Military arrests lawful	29
On what ground force is justifiable	30
Martial law	31
War power has limits	31
Arrests necessary	32
Military crimes	32
Double liability	32

Page.

Acts made criminal by a state of war 33
Arrest of innocent persons 34
Cause of arrest cannot be safely disclosed 37
Arrests to prevent hostilities 37
Restraint of liberty by compulsory military duty exceeds temporary restraint by arrests 39
Military arrests made by all governments in civil war 40
Peculiar necessities of civil war 41
Marks of hostility 41
Who ought and who ought not to be arrested 42
Instances of acts of hostility 43
Necessity of power to arrest those who resist draft 43
Territorial extent of martial and military law 44
Habeas corpus 46
Constitutionality of the enrollment act, March 3, 1863 49
Indemnity 55
Instructions of the War Department to officers having charge of deserters 57

MILITARY ARRESTS.

The people of America, educated to make their own laws, and to respect and abide by them, having made great sacrifices in olden times to acquire and maintain civil liberty under the law, and holding the rights of every citizen, however humble, as sacred as the rights of a sovereign, accustomed to an almost uninterrupted tranquillity, and to the full enjoyment of the rights guaranteed by our Constitution and laws to citizens in time of peace, have been suddenly thrown into a new and startling position. The same Constitution which has guarded their rights in peace is now suddenly wheeled round for their protection against their former associates, who have now become public enemies. A safeguard to its friends, it is an engine of destruction to its foes. Can it be wondered at that the sudden transition from their accustomed personal liberty to the stern restrictions imperatively required by the necessities of public safety, in time of civil war, should have found many intelligent and patriotic men, unprepared for this great change, alarmed by its consequences, and fearful that civil liberty itself might go down by military usurpation?

ARRESTS IN LOYAL STATES REGARDED WITH ALARM.

The arrest by military authority of enemies who are still left in the loyal States, and who are actually committing, or who entertain the will and intention to com-

mit, hostile acts tending to obstruct, impede, or destroy the military operations of the army or navy, and the detention of such persons for the purpose of preventing hostilities, has been looked upon with alarm.

RIGHT OF FREEDOM FROM ARREST CLAIMED BY PUBLIC ENEMIES.

And it has happened that loyal and peaceful citizens have in some instances made the mistake of setting up unjustifiable claims in behalf of public enemies, and of asserting for them the privilege of freedom from military arrest or of discharge from imprisonment. Citizens, meaning to be loyal, have thus aided the public enemy by striving to prevent the military power of the government from temporarily restraining persons who were acting in open hostility to the country in time of war.

CIVIL WAR CHANGES OUR LIBERTIES.

In time of civil war every citizen must needs be curtailed of some of his accustomed privileges.

The soldier and sailor give up most of their personal liberty to the will and order of their commanding officers.

The person capable of bearing arms may be enrolled in the forces of the United States, and is liable to be made a soldier.

Our property is liable to be diminished by unusual taxes, or wholly appropriated to public use, or to be destroyed on the approach of an enemy.

Trade, intercourse, the uses to which it is usually lawful to put property of all kinds, are changed by war.

No civil, municipal, constitutional or international right is unchanged by the intervention of war.

Shall the person who is disloyal or hostile to the government and country complain that his privileges are also modified in order to protect the country from his own misconduct?

GENERAL WAR POWERS OF THE PRESIDENT.

Some remarks on the *general* war powers of the President being essential to an explanation of the subject of *military arrests*, it has been found most convenient to reprint from a former treatise the following extracts on that subject:

"It is not intended (in this chapter*) to explain the *general* war powers of the President. They are principally contained in the Constitution, Art. II, Sect. 1, Cl. 1 and 7; Sect. 2, Cl. 1; Sect. 3, Cl. 1; and in Sect. 1, Cl. 1, and by necessary implication in Art. I, Sect. 9, Cl. 2. By Art. II, Sect. 2, the President is made commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the service of the United States. This clause gives ample powers of war to the President, when the army and navy are lawfully in "actual service." His military authority is supreme, under the Constitution, while governing and regulating the land and naval forces, and treating captures on land and water in accordance with such rules as Congress may have passed in pursuance of Art. I, Sect. 8, Cl. 11, 14. Congress may effectually control the military power, by refusing to vote supplies, or to raise troops, and by impeachment of the President; but for the military move-

*Chapter III "War Powers of the President, &c.," pages 82, 83, seventh edition.

ments, and measures essential to overcome the enemy—for the general conduct of the war—the President is responsible to, and controlled, by no other department of government. His duty is to uphold the Constitution and enforce the laws, and to respect whatever rights loyal citizens are entitled to enjoy in time of civil war, to the fullest extent that may be consistent with the performance of the military duty imposed on him.*

"What is the extent of the military power of the President over the persons and property of citizens at a distance from the seat of war—whether he or the War Department may lawfully order the arrest of citizens in loyal States on reasonable proof that they are either enemies or aiding the enemy; or that they are spies or emissaries of rebels sent to gain information for their use, or to discourage enlistments; whether martial law may be extended over such places as the commander deems it necessary to guard, even though distant from any battle-field, in order to enable him to prosecute the war effectually; whether the writ of *habeas corpus* may be suspended, as to persons under military arrest, by the President, or only by Congress, (on which point judges of the United States courts disagree;) whether, in time of war, all citizens are liable to military arrest, on reasonable proof of their aiding or abetting the enemy, or whether they are entitled to practice treason until indicted by some grand jury; thus, for example, whether Jefferson Davis, or General Lee, if found in Boston, could be arrested by military authority and sent to Fort Warren? Whether, in the midst of wide-spread and terrific war, those persons

* The effect of a state of war, in changing or modifying civil rights, is explained in the "War Powers of the President," &c.

who violate the laws of war and the laws of peace, traitors, spies, emissaries, brigands, bushwhackers, guerillas, persons in the free States supplying arms and ammunition to the enemy, must all be proceeded against by civil tribunals only, under due forms and precedents of law, by the tardy and ineffectual machinery of arrests by *marshals*, (who can rarely have means of apprehending them,) and of grand *juries*, (who meet twice a year, and could seldom if ever seasonably secure the evidence on which to indict them?) Whether government is not entitled by military power to PREVENT the traitors and spies, by arrest and imprisonment, from doing the intended mischief, as well as to punish them after it is done? Whether war can be carried on successfully, without the power to save the army and navy from being betrayed and destroyed, by *depriving* any citizen temporarily of the power of acting as an enemy, whenever there is reasonable cause to suspect him of being one? Whether these and similar proceedings are, or are not, in violation of any civil rights of citizens under the Constitution, are questions to which the answers depend on the construction given to the war powers of the Executive. Whatever any commander-in-chief, in accordance with the usual practice of carrying on war among civilized nations, may order his army and navy to do, is within the *power* of the President to order and to execute, because the Constitution, in express terms, gives him the supreme command of both. If he makes war upon a foreign nation, he should be governed by the law of nations; if lawfully engaged in civil war, he may treat his enemies as subjects and as belligerents.

"The Constitution provides that the government and

regulation of the land and naval forces, and the treatment of captures, should be according to law; but it imposes, in express terms, no other qualification of the war power of the President. It does not prescribe any territorial limits, within the United States, to which his military operations shall be restricted; nor to which the picket guards or military officers (sometimes called *provost marshals*) shall be confined. It does not exempt any person making war upon the country, or aiding and comforting the enemy, from being *captured*, or arrested, wherever he may be found, whether within or out of the lines of any division of the army. It does not provide that public enemies, or their abettors, shall find safe asylum in any part of the United States where military power can reach them. It requires the President, as an executive magistrate, in time of peace, to see that the laws existing in time of peace are faithfully executed; and as commander-in-chief, in time of war, to see that the laws of war are executed. In doing both duties he is strictly obeying the Constitution."

MARTIAL LAW IS THE LAW OF WAR.

It consists of a code of rules and principles regulating the rights, liabilities, and duties, the social, municipal, and international relations in time of war of all persons, whether neutral or belligerent. These rules are liable to modification in the United States by statutes, usually termed "military law," or "articles of war," and the "rules and regulations made in pursuance thereof."

FOUNDATION OF MARTIAL LAW.

Municipal law is founded upon the necessities of social organization. Martial law is founded upon the

necessities of war. Whatever compels a resort to war, compels the enforcement of the laws of war.

THE EXTENT OF THE MEANS OF WAR AS SHOWN BY THE NECESSITIES OF WAR, AND ITS OBJECTS.

The objects and purposes for which war is inaugurated required the use of the instrumentalities of war.

When the law of force is appealed to, force must be sufficiently untrammelled to be *effectual.* Military power must not be restrained from reaching the public enemy in all localities, under all disguises. In war there should be no asylum for treason. The ægis of law should not cover a traitor.

A public enemy, wherever he may be found, may, if he resists, be killed, or captured, and if captured he may be detained as a prisoner.

The purposes for which war is carried on may and must be accomplished. If it is justifiable to commence and continue war, then it is justifiable to extend the operations of war until they shall have completely attained the end for which it was commenced, by the use of all means employed in accordance with the rules of civilized warfare.

And among those means none are more familiar or more essential than that of capturing, or arresting, and confining the enemy. Necessity arbitrates the rights and the methods of war. Whatever hostile military act is essential to public safety in civil war is lawful.

POWERS AND RESPONSIBILITIES OF MILITARY COMMANDERS.

"The law of nature and of nations gives to belligerents the right to employ such force as may be necessary in order to obtain the object for which the war was under-

taken." Beyond this the use of force is unlawful. This necessity forms the limit of hostile operations.

We have the same rights of war against the co-allies or associates of an enemy as against the principal belligerent.

When military forces are called into service for the purpose of securing the public safety, they may lawfully obey military orders made by their superior officers. The commander-in-chief is responsible for the mode of carrying on war: He determines the persons or people against whom his forces shall be used. He alone is constituted the judge of the nature of the exigency, of the appropriate means to meet it, and of the hostile character or purposes of individuals whose conduct gives him cause to believe them public enemies.

His right to seize, capture, detain, and imprison such persons is as unquestionable as his right to carry on war. The extent of the danger he is to provide against must be determined by him; he is responsible, if he neglects to use the means of meeting or avoiding it.

The nature of the difficulty to be met and the object to be accomplished afford the true measure and limit of the use of military powers. The military commander must judge *who* the public enemy are, where they are, what degree of force shall be used against them, and what warlike measures are best suited to conquer the enemy or restrain him from future mischief. If the enemy be in small force, they may be captured by another small force; if the enemy be a single individual, he may be captured by a provost guard or marshal. If an officer in the honest exercise of his duty makes a mistake in arresting a friend instead of an enemy, or in

detaining a suspicious person, who may be finally liberated, he is not for such error responsible in criminal or civil courts.

Any other rule would render war impracticable, and by exposing soldiers to the hazard of ruinous litigation, by reason of liability to civil tribunals, would render obedience to orders dangerous, and thus would break down the discipline of armies.

ARRESTS ON SUSPICION.

Arrests or captures of persons whose conduct gives reasonable cause of suspicion that they contemplate acts of hostility, are required and justified by military and martial law. Such arrests are precautionary. The detention of such suspected persons by military authority is, for the same reason, necessary and justifiable.*

Nothing in the Constitution or laws can define the possible extent of any military danger. Nothing therefore in either of them can fix or define the extent of power necessary to meet the emergency, to control the military movements of the army, or of any detachments from it, or of any single officer, provost marshal, or private.

Hence it is worse than idle to attempt to lay down rules of law defining the territorial limits of military operations, or of martial law, or of captures and arrests.

Wherever danger arises, there should go the military means of defence or safeguard against it. Wherever a single enemy makes his appearance, there he should be arrested and restrained.

* Luther *vs.* Borden, 7 Howard's Supreme Court Reports, p. 1.

ABUSE OF POWER OF ARREST.

The power of arrest and imprisonment is doubtless liable to abuse. But the liability to abuse does not prove that the power does not exist. "There is no power, says the Supreme Court, that is not susceptible of abuse The remedy for this as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny."*

SAFEGUARDS.

Our safeguard against the misuse of power is not, by denying its existence, to deprive ourselves of its protection in time of war, but to rely on the civil responsibility of the officer.

The right of impeachment of the commander-in-chief, the frequent change of public officers, the control of the army and navy by the legislative power of Congress, the power of Congress over supplies, the power of Congress to make laws regulating and controlling the use of military power wherever it is liable to abuse, the fact that the Commander-in-chief is also President and chief executive officer of government, and the great intelligence and high character of our soldiers, are all safe-

* 12 Wheaton's Reports, page 32.

guards against arbitrary power or the abuse of legal authority.

EFFECT OF WAR UPON THE COURTS AND OF COURTS UPON THE WAR.

Justice should rule over the deadly encounters of the battle-field; but courts and constables are there quite out of place. Far from the centres of active hostilities, judicial tribunals may still administer municipal law, so long as their proceedings do not interfere with military operations. But if the members of a court should impede, oppose, or interfere with military operations in the field, whether acting as magistrates or as individuals, they, like all other public enemies, are liable to capture and imprisonment by martial law. They have then become a belligerent enemy.

The character of their actions is to be determined by the military commander; not by the parchment which contains their commissions. A judge may be a public enemy as effectually as any other citizen. The rebellious districts show many examples of such characters. Is a judge sitting in a northern court, and endeavoring to commit acts of hostility under the guise of administering law, any less a public enemy than if he were holding court in South Carolina, and pretending to confiscate the property of loyal men? Are the black gown and wig to be the protection of traitors?

General Jackson arrested a judge in the war of 1812, kept him in prison in order to prevent his acts of judicial hostility, and liberated him when he had repulsed the enemy. The illegal fine imposed on him by that judge was repaid to the general after many years under a vote of Congress. Why should a judge be protected from the

consequences of his act of hostility more than the clergyman, the lawyer, or the governor of a State ?

The public safety must not be hazarded by enemies whatever position they may hold in public or private life. The more eminent their position, the more dangerous their disloyalty.

Among acts of hostility which constitute judges, public enemies, and subject them to arrest, are these:

1. When a State judge is judicially apprised that a party is in custody under the authority of the United States, he can proceed no further, under a *habeas corpus* or other process, to discharge the prisoner.

If he orders the prisoner to be discharged, it is the duty of the officer holding the prisoner to resist that order, and the laws of the United States will sustain him in doing so, and of the acts of the judge in arresting and imprisoning the judge, if necessary.*

2. So long as the courts do not interfere with military operations ordered by the commander-in-chief, litigation may proceed as usual; but if that litigation entangles and harasses the soldiers or the officers so as to disable them from doing their military duty, the judges and the actors being hostile, and using legal processes for the purpose and design of impeding and obstructing the necessary military operations in time of war, the courts and lawyers are liable to precautionary arrest and confinement, whether they have committed a crime known to the statute law or not. Military restraint is to be used for the prevention of hostilities, and public safety in time of civil war will not permit courts or constables, colleges

* Ableman *vs.* Booth, 21 How. 524–5.

or slave-pens, to be used as instruments of hostility to the country.

When a traitor is seized in the act of committing hostility against the country, it makes no difference whether he is captured in a swamp or in a court-house, or whether he has in his pocket the commission of a judge or a colonel.

Commanders in the field are under no obligations to take the opinions of judges as to the character or extent of their military operations, nor as to the question who are and who are not public enemies, nor who have and who have not given reasonable cause to believe that acts of hostility are intended. These questions are, by the paramount laws of war, to be settled by the officer in command.

MILITARY ARRESTS ARE NOT FORBIDDEN BY THE CONSTITUTION.

The framers of the Constitution having given to the commander-in-chief the full control of the army when in active service, subject only to the articles of war, have therefore given him the full powers of capture and arrest of enemies, and have placed upon him the corresponding obligation to use any and all such powers as may be proper to insure the the success of our arms. To carry on war without the power of capturing or arresting enemies would be impossible. We should not, therefore, expect to find in the Constitution any provision which would deprive the country of any means of self-defence in time of unusual public danger.

We look in vain in the Constitution for a clause which in any way limits the methods of using war powers when war exists.

Some persons have turned attention to certain passages in the amendments relating, as was supposed, to this subject. Let us examine them:

ARTICLE IV. "The right of the people to be secure in their persons, houses, papers, and effects against *unreasonable* searches and seizures shall not be violated."

This amendment merely declares that the right of being secure against UNREASONABLE seizures or arrests shall not be violated. It does not declare that NO ARRESTS shall be made. Will any one deny that it is *reasonable* to arrest or capture the person of a public enemy?

If all arrests, reasonable or unreasonable, were prohibited, public safety would be disregarded in favor of the rights of individuals.

Not only may military, but even civil, arrests be made when *reasonable.*

ARRESTS WITHOUT WARRANT.

It is objected that military arrests are made without warrant. The military order is the warrant authorizing arrest, issuing from a commander, in like manner as the judicial order is the warrant authorizing arrest, issuing from a court. But even civil arrests at common law may be made without warrant by constables, or by private persons.—(1 Chitty, C. L., 15 to 22.) There is a liability to fine and imprisonment if an offender is voluntarily permitted to escape by a person present at the commission of a felony or the infliction of a dangerous wound.

Whenever there is probable ground of suspicion that a felony has been committed, a private person may without warrant arrest the felon, and probable cause will protect the captor from civil liability.

"When a felony has been committed, a constable may arrest a supposed offender on information without a positive charge, and without a positive knowledge of the circumstances." And Chitty says, page 217, "A constable may justify an imprisonment, without warrant, on a reasonable charge of felony made to him, although he afterwards discharge the prisoner without taking him before a magistrate, although it turns out that no felony was committed by any one."

In Wakely *vs.* Hart, 6 Binney, 318, Chief Justice Tilghman says of the constitution of Pennsylvania, which is nearly in the same words on this subject as the Constitution of the United States:

"The plaintiff insist that by the constitution of this State no arrest is lawful without warrant issued on probable cause, supported by oath. Whether this be the true construction of the constitution is the main point in the case. It is declared in the 9th article, section 7, 'that the people shall be secure in their persons, houses, papers, and possessions, from unreasonable arrests, and that no warrant to search any place, or seize any person or thing, shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation.'

"The provisions of this section, so far as concern warrants, only guard against their abuse by issuing them without good cause, and in so general and vague a form as may put it in the power of officers who execute them to harass innocent persons under pretence of suspicion; for, if general warrants were allowed, it must be left to the discretion of the officer on what persons or things they are to be executed. But *it is nowhere said* that there shall be *no arrest without warrant.* To have said so would have endangered the safety of society. The felon who is seen to commit murder or robbery must be arrested on the spot, or suffered to escape. So, although if not seen, yet if known to have committed a felony, and pursued with or without warrant, he may be arrested by any person.

"And even where there is only probable cause of suspicion, a *private person* may, without warrant, at his peril, make the arrest. I

say at his peril, for nothing short of proving the felony will justify the arrest;" (that is, by a private person on suspicion.) "These principles of common law are essential to the welfare of society, and not intended to be altered or impaired by the constitution."

The right, summarily, to arrest persons in the act of committing heinous crimes has thus been sanctioned from ancient times by the laws of England and America. No warrant is required to justify arrests of persons committing felonies. The right to make such arrests is essential to the preservation of the existence of society, though its exercise ought to be carefully guarded. The great problem is to reconcile the necessities of government with the security of personal liberty.

If, in time of peace, civil arrests for felonies may be made by private citizens without warrant, *a fortiori*, military arrests in time of war for acts of hostility, either executed or contemplated, may be made under the warrant of a military command. And the provision that *unreasonable* seizures or arrests are prohibited has no application to military arrests in time of war.

OBJECTION THAT ARRESTS ARE MADE WITHOUT INDICTMENT.

The 5th article of the amendments of the Constition provides that—

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

This article has no reference to the rights of citizens un-

der the exigencies of war, but relates only to their rights in time of peace. It is provided that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. If rebellion or treason be one of the offences here alluded to, and a rebel has been once *under fire*, and thus been put in jeopardy of life or limb, (in one sense of that phrase,) he could not be fired at a second time without violating the Constitution, because a second shot would put him twice in jeopardy for the same offence.

"Nor shall he be deprived of life, liberty, or property without due process of law." If this provision relates to the rights of citizens *in time of war*, it is obvious that no property can be captured, no rebel killed in battle or imprisoned by martial law.

The claim that "no person shall be held to answer for a capital or otherwise infamous crime, unless upon a presentment or indictment of a grand jury, except in cases," &c., in like manner applies only to the rights of citizens in time of peace.

What are "cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger?"

Suppose the Union forces arrest a spy from the enemy's camp, or catch a band of guerillas, neither the spy nor the guerillas belong to OUR land forces or navy. The enemy are no part of *our* forces or of *our* militia; and while this provision covers offences therein specified, if committed by *our* troops, and allows them to be dealt with by martial law, it would (if it is applicable in time of war) prevent our executing martial law against such enemies captured in war. We should, under such a construction, be required to indict and prosecute

our enemy for capital crimes, instead of capturing and treating them as prisoners of war, or punishing them according to the laws of war.

The absurdity of such a construction is obvious. The language is inapplicable to a case of military arrest in war time. No soldier is held to answer for a crime; he is captured as a prisoner of war, to be released, paroled, or exchanged. He is never expected to answer to any indictment; prisoners of war are not indicted.

Nor can any prisoner be held to answer for any crime unless upon a charge of such crime made before some tribunal. No such charge is made against prisoners of war, nor are they charged with any crime, infamous or otherwise, and therefore they are not held to answer any.

Hence that clause in the Constitution which provides for trial by jury, the right to be informed of the nature and cause of the accusation, &c., relates in express terms only to criminal prosecutions, and has nothing to do with military arrests or the procedures of martial law.

Therefore it is obvious that while criminal proceedings against persons not in the naval or military service are guarded in time of peace, and the outposts of justice are secured by freedom from unreasonable arrests, and in requiring indictment to be found by grand jurors, speedy and public trial by an impartial jury, information of the nature of the charges, open examination of witnesses, and aid of counsel, &c., all these high privileges are not accorded to our public enemy in time of war, nor to those citizens who commit military offences, which, not being against any statute or municipal law, cannot be the foundation of any indict-

ment, punishment, or trial by jury, and do not constitute any capital or otherwise infamous crime, or to persons who commit acts which impede, embarrass, and tend to thwart the military measures of the government.

The safeguards of criminal procedures in courts of justice in time of peace are not to be construed into protection of public enemies in time of war.

THE CONSTITUTION SANCTIONS MILITARY ARRESTS.

The Constitution itself authorizes courts-martial. These courts punish for offences different from those provided for by any criminal statute. Therefore it follows that crimes not against statue laws may be punished by law according to the Constitution, and also that arrests necessary to bring the offenders before that tribunal are lawful.

In *Dynes* vs. *Hoover*,* the evidence was that an attempt had been made to hold a marshal liable for executing the order of the President of the United States in committing Dynes to the penitentiary for an offence of which he had been adjudged guilty by a naval court martial.

This case shows that the crimes to be punished, and the modes of procedure by courts-martial are different from those punished by civil tribunals; that the jurisdiction of these classes of tribunals is distinct, and that the judicial power and the military power of courts-martial are independent of each other, and both authorized by the same Constitution, and courts-martial may punish offences other than those provided for by criminal statutes. And if they may do so, it follows that persons

* 20 Howard's Supreme Court Reports, page 65.

may be arrested for such offences. The law is laid down by the court as follows:

"The demurrer admits that the court-martial was legally organized, and the crime charged was one forbidden by law; that the court had jurisdiction of the charge as it was made; that a trial took place before the court upon the charge, and the defendant's plea of not guilty; and that, upon the evidence in the case, the court found Dynes guilty of an attempt to desert, and sentenced him to be punished as has been already stated; that the sentence of the court was approved by the Secretary, and by his direction Dynes was brought to Washington; and that the defendant was marshal for the District of Columbia, and that in receiving Dynes and committing him to the keeper of the penitentiary, he obeyed the orders of the President of the United States in execution of the sentence. Among the powers conferred upon Congress by the 8th section of the 1st article of the Constitution are the following: 'To provide and maintain a navy;' 'to make rules for the government of the land and naval forces.' And the eighth amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operation 'cases arising in the land or naval forces.' And by the 2d section of the 2d article of the Constitution, it is declared that 'the President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States.'

"These provisions show that Congress has the power to provide for *the trial and punishment of military and naval offences in the manner then and now practiced by*

civilized nations, and that the power to do so is given without any connexion between it and the 3d article of the Constitution, defining the judicial power of the United States; *indeed, that the two powers are entirely independent of each other.*"

The fact that the power exists of suspending the writ of *habeas corpus* in time of rebellion, when the public safety requires it, shows that the framers of the Constitution expected that arrests would be made for crimes not against municipal law, and that the administration of the ordinary rules of law on *habeas corpus* would require discharge of prisoners, and that such discharge might endanger public safety. It was to protect public safety in time of rebellion that the right to suspend the *habeas corpus* was left in the power of government.

MILITARY POWERS MAY BE DELEGATED.

In the course of the preceding remarks the commander-in-chief has been the only military authority spoken of as authorized to order arrests and seizures. His powers may be delegated to officers, and may be exercised by them under his command. So also the Secretaries of War and State are public officers through whom the President acts in making orders for arrests, and their acts are in law the acts of the President. It is necessary to the proper conduct of war that many if not most of the powers of the President or commander should be exercised by his Secretaries and his generals, and that many of their powers should be executed by officers under them; and although it not seldom happens that subalterns use the powers of arrest and detention

yet the inconvenience resulting from this fact is one of the inevitable misfortunes of war.

OBEDIENCE OF ORDERS IS JUSTIFICATION.

Whatever military man obeys the order of his superior officer, is justified by law in doing so. Obedience to orders is a part of the law of the land; a violation of that law subjects the soldier to disgraceful punishment. Acts done in obedience to military orders will not subject the agent to civil or criminal liability in courts of law. But, on the other hand, any abuse of military authority subjects the offender to civil liability for such abuse, and he who authorized the wrong is responsible for it.

OFFICERS MAKING ARRESTS NOT LIABLE TO CIVIL SUIT OR CRIMINAL PROSECUTION.

That military arrests are deemed necessary for public safety by Congress is shown by the act of March 3, 1863, ch. 81, wherein it is provided that no person arrested by authority of the President of the United States shall be discharged from imprisonment so long as the war lasts, and the President shall see fit to suspend the privilege of the writ of *habeas corpus*.

The 4th section of the same act provides "that any order of the President, or under his authority, made at any time during the existence of this present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending or to be commenced for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done under and by virtue of such order, or under color of any law of Con-

gress, and such defence may be made by special plea, or under the general issue."

The same act further provides that actions against officers and others for torts in arrests commenced in State courts may be removed to circuit courts, and thence to the Supreme Court. The jurisdiction of State courts thereupon ceases, and the rights of the defendant may be protected by the laws of the United States administered by the Supreme Court. By these provisions there is secured protection for the past and security in the future performance of military and civil duties under orders of the President in time of war; and the statute contains an implied admission of the necessity to public welfare of arrests for crimes not against statutes, but endangering public safety, and of imprisonments for offences not known to the municipal laws, but yet equally dangerous to the country in civil war.

ARBITRARY POWER NOT CONSISTENT WITH CONSTITUTIONAL OR FREE GOVERNMENTS.

The exercise of irresponsible powers is incompatible with constitutional government. Unbridled will, the offspring of selfishness and of arrogance, regards no rights, and listens to no claims of reason, justice, policy, or honor. Its imperious mandate being its only law, arbitrary power sucks out the heart's blood of civil liberty. Vindicated by our fathers on many a hard-fought battlefield, and made holy by the sacrifice of their noblest sons, that liberty must not be wounded or destroyed; and in time of peace, in a free country, its power should shelter loyal citizens from arbitrary arrests and unreasonable seizures of their persons or property.

TRUE MEANING OF "ARBITRARY" AS DISTINGUISHED FROM "DISCRETIONARY."

What arrests are "arbitrary?"

Among the acts of war which have been severely censured is that class of military captures reproachfully styled "arbitrary" arrests.

What is the true meaning of the word "arbitrary?" When used to characterize military arrests it means such as are made at the mere will and pleasure of the officer, without right, and without lawful authority. But powers are not arbitrary because they may be discretionary. The authority of judges is often discretionary; and even if discretion be governed by rules, the judge makes his own rules; yet no one can justly claim that such judicial authority is arbitrary.

The existence of an authority may be undeniable, while the mode of using it may be discretionary. A power is arbitrary only when it is founded upon no rightful authority, civil or military. It may be within the discretion of a commander to make a military order; to dictate its terms; to act upon facts and reasons known only to himself; it may suddenly and violently affect the property, liberty, or life of soldiers or of citizens; yet such an order, being the lawful use of a discretionary authority, is not the exercise of arbitrary power. When such orders are issued on the field, or in the midst of active operations, no objection is made to them on the pretence that they are lawless or unauthorized, nor for the reason that they must be instantly and absolutely obeyed

The difference is plain between the exercise of arbitrary power and the arbitrary exercise of power. The former is against law; the latter, however, ungraciously or inconsiderately used, is lawful.

MILITARY ARRESTS LAWFUL.

The laws of war, military and martial, written and unwritten, founded on the necessities of government, are sanctioned by the Constitution and laws, and recognized as valid by the Supreme Court of the United States.

Arrests made under the laws of war are neither arbitrary nor without legal justification.

In *Cross* vs. *Harrison*, *Judge Wayne*, delivering the opinion, (16 Howard, 189, 190,) says:

"Early in 1847 the President, as constitutional commander-in-chief of the army and navy, authorized the military and naval commanders of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government and of the army, which had the conquest in possession. No one can doubt that these orders of the President and the action of our army and navy commanders in California, in conformity with them, was according to the law of arms," &c.

So, in *Fleming* vs. *Paige*, (9 Howard, 615,) Chief Justice Taney says:

"The person who acted in the character of collector in this instance, acted as such under the authority of the military commander and in obedience to his orders; and the regulations he adopted were not those prescribed by law, but by the President in his character as commander-in-chief."

It is established by these opinions that military orders, in accordance with martial law or the laws of war, though they may be contrary to municipal laws; and the use of the usual means of enforcing such orders by military power, including capture, arrest, imprisonment, or the destruction of life and property, are authorized and sustained upon the firm basis of martial law, which is, in time of war, constitutional law.

A military arrest being one of the recognized necessities of warfare, is as legal and constitutional a procedure, under the laws of war, as an arrest by civil authority by the sheriff, after the criminal has been indicted by a grand jury for a statute offence.

In time of peace the interference of military force is offensive to a free people. Its decrees seem overbearing, and its procedures violent. It has few safeguards and no restraints. The genius of republican government revolts against permanent military rule. Hence the suspicions of the people are easily aroused upon any appearance of usurpation. It is for this reason that some opponents of the government have endeavored to cripple the war power of the President by making against him the unfounded pretence that military arrests, a familiar weapon of warfare, can be employed only at the hazard of civil liberty.

ON WHAT GROUND FORCE IS JUSTIFIABLE.

When the administration of laws is resisted by an armed public enemy; when government is assaulted or overthrown; when magistrate and ruler are alike powerless, the nation must assert and maintain its rights by force of arms. Government must fight or perish. Self-

preservation requires the nation to defend its rights by military power. The right to use military power rests on the universal law of self-defence.

MARTIAL LAW.

When war is waged, it ought not to degenerate into unbridled brutality, but it should conform to the dictates of justice and of humanity. Its objects, means, and methods should be justifiable in the forum of civilized and Christian nations. The laws or rules which usually govern this use of force are called military and martial law, or the laws of war.

Principles deducible from a consideration of the nature, objects, and means of war will, if understood, remove from the mind the apprehension of danger to civil liberty from military arrests and other employment of force. When war exists, whatever is done in accordance with the laws of war is not arbitrary, and is not in derogation of the civil rights of citizens, but is *lawful*, justifiable, and indispensable to public safety.

WAR POWER HAS LIMITS.

Although the empire of the war power is vast, yet it has definite boundaries, wherein it is supreme. It overrides municipal laws and all domestic institutions or relations which impede or interfere with its complete sway. It reigns uncontrollable until its legitimate work is executed; but then it lays down its dripping sword at the feet of Justice whose wrongs it has avenged.

It is not now proposed to define the limits and restrictions imposed by the laws of warfare upon the gen-

eral proceedings of belligerents. It is to one only of the usual methods of war that attention is now directed, namely, to the capture and detention of public enemies.

ARRESTS NECESSARY.

Effectual hostilities could not be prosecuted without exercising the right to capture and imprison hostile persons. Barbarous nations only would justify the killing of those who might fall into their power. It is now too late to question the authority of martial law which sanctions the arrest and detention of those who engage in foreign or civil war. The imprisonment of such persons is much more important to the public safety in civil than in international warfare.

MILITARY CRIMES.

Military crimes, or crimes of war, include all acts of hostility to the country, to the government, or to any department or officer thereof; to the army or navy, or to any person employed therein: *provided* that such acts of hostility have the effect of opposing, embarrassing, defeating, or even of interfering with our military or naval operations in carrying on the war, or of aiding, encouraging, or supporting the enemy.

According to the laws of war, military arrests may be made for the punishment or prevention of military crimes.

DOUBLE LIABILITY.

Such crimes may or may not be offences against statutes. The fact that an act of hostility is against municipal as well as martial law, even though it may

subject the offender to indictment in civil tribunals, does not relieve him from responsibility to military power.

To make civil war against the United States is to commit treason. Such act of treason renders the traitor liable to indictment and condemnation in the courts, and to capture, arrest, or death on the field of battle. But because a traitor may be hung as a criminal by the sheriff, it does not follow that he may not be captured, arrested, or shot as a public enemy by the soldiers.

An act of hostility may thus subject the offender to twofold liability: first to civil, and then to military tribunals. Whoever denies the right to make military arrests for crimes which are punishable by civil tribunals, would necessarily withhold one of the usual and most effective and essential means of carrying on war. Whoever restricts the right to cases where crimes have been committed in violation of some special statute, would destroy one of the chief safeguards of public security and defence.

ACTS MADE CRIMINAL BY A STATE OF WAR.

The quality of an act depends on the time, place, and circumstances under which it is performed.

Acts which would have been harmless and innocent in time of peace, become dangerous, injurious, and guilty in time of war. The rules and regulations of "the service" contain many illustrations of this fact. For a soldier to speak contemptuously of a superior officer might, as between two civilians, be a harmless or beneficial use of "free speech;" but as in time of war such "free speech" might destroy discipline, encourage diso-

bedience of orders, or even break up the confidence of the soldiers in their commanders, such speaking is strictly forbidden, and becomes a crime.

Most of the regulations which require obedience to orders are such that disregard of them would, in time of peace, by civilians, be no breach of law or of morals, yet a breach of them by soldiers becomes a moral and a military crime.

In like manner, a citizen may commit acts to which he is accustomed in ordinary times, but which become grave offences in time of war, although not embraced in the civil penal code.

Actions not constituting any offence against the municipal code of a country, having become highly injurious and embarrassing to military operations, may and must be *prevented* if not *punished.* Such actions, being crimes against military or martial law or the laws of war, can be prevented only by arrest and confinement or destruction of the offender. If an act which interferes with military operations is not against municipal law, the greater is the reason for preventing it by martial law. And if such an action cannot be punished nor prevented by civil or criminal law, this fact makes stronger the necessity for preventing evil consequences by arresting the offender.

Absence of penal law imperatively demands application of military preventive process—*i. e.*, ARRESTS.

ARREST OF INNOCENT PERSONS.

Innocent persons are, under certain circumstances, liable to military arrest in time of civil war. Suppose an army retreating from an unsuccessful battle, and desirous of concealing from the enemy the number,

position, and directions taken by the forces; and if, in order to prevent these facts from becoming known to their pursuers, the persons who are met on the retreat are captured and carried away, can any one doubt the right of making such arrests? However loyal or friendly those persons may be, yet, if seized by a pursuing enemy, they might be compelled to disclose facts by which the retreating army could be destroyed. *Hence*, when war *exists*, and the arrest and detention of even innocent persons is essential to the *success* of military operations, such arrest and detention are lawful and justifiable.

Suppose a loyal judge holding a court in a loyal State, and a witness is on the stand who knows the details of a proposed military expedition which it would be highly injurious to the military operations of the army or navy to have disclosed or made public, would any one doubt the right of the military commander to *stop the trial* on the instant, and, if necessary, to imprison the judge or the witness, to prevent betrayal of our military plans and expeditions, so that they might come to the knowledge of our enemy?

The innocence of the person who may through ignorance, or weakness, or folly, endanger the success of military expeditions, does not deprive the military commander of the power to guard against hazard and prevent mischief.

The true principle is this: the military commander has the power, in time of war, to arrest and detain all persons who, by being at large, he has reasonable cause to believe will impede or endanger the military operations of the country.

The true test of liability to arrest is, therefore, not alone the guilt or innocence of the party; not alone the neighborhood or distance from the places where battles are impending; not alone whether he is engaged in active hostilities: but whether his being at large will actually tend to *impede*, embarrass, or hinder the *bona fide* military operations in creating, organizing, maintaining, and most effectually using the military forces of the country.

No other motive or object for making military arrests, except for military crimes, is to be tolerated; no arrests, made under pretence of military power for other objects, are *lawful* or justifiable. The dividing line between *civil liberty* and military power is precisely here: civil liberty secures the right to freedom from arrests except by civil process in time of peace; or by military power when war exists, and the exigencies of the case are such that the arrest is required in order to prevent embarrassment or injury to the *bona fide* military operations of the army or navy.

It is not enough to justify an arrest to say that *war exists*, or that it is a *time* of war, (unless martial law is declared.) Nor is it necessary to justify arrests that active hostilities should be going on at the *place* of the arrest. It is, however, enough to justify arrests in any locality, however far removed from the battle-fields of contending armies, if it is *a time* of war, and the *arrest* is required to punish a military crime, *prevent* an act of hostility, or even to avoid the danger that military operations of any description may be impeded, embarrased, or prevented.

In considering the subject of arrests, it must be borne

in mind that "a person taken and held by the military forces, whether before, or in, or after a battle, or without any battle at all, is virtually *a prisoner of war*. No matter what his alleged offence, whether he is a rebel, a traitor, a spy, or an enemy in arms, he is to be held and punished according to *the laws of war*, for these have been substituted for the laws of peace."

CAUSE OF ARREST CANNOT BE SAFELY DISCLOSED.

It cannot be expected, when government finds it necessary to make arrests for causes which exist during civil war, that the reasons for making such arrests should be at once made public; otherwise the purpose for which the arrest is made might be defeated. Thus, if a conspiracy has been formed to commit hostilities, and one conspirator is arrested, publishing the facts might enable other co-conspirators to escape, and take advantage of their information. It may be necessary to make arrests on grounds justifying suspicion of hostile intentions, when it might be an act of injustice to the party suspected, if innocent, to publish the facts on which such suspicions were entertained; and if guilty, it might prevent the government from obtaining proof against him, or preventing the hostile act. Under these circumstances the safety of civil liberty must rest in the honesty, integrity, and responsibility of those who have been for the time clothed with the high powers of administering the government.

ARRESTS TO PREVENT HOSTILITIES.

The best use of armies and of navies is not to punish criminals for offences against laws, but to prevent public enemies from committing future hostilities. Victory

and conquest are not for revenge of wrongs, but for security of rights. Arch traitors and consummate villains are not those on whom the avenging sword is most apt to fall, but the dupes and victims of their crimes are those who oftenest bear the sharp catastrophy of battles.

We arrest and hold an enemy not to punish, but to restrain him from acts of hostility; we hang a spy not only to deter others from committing a similar offence but chiefly to prevent his betraying us to the enemy.

We capture and destroy the property even of friends, if exposed in an enemy's country, not to injure those who wish us well, but to withdraw their property from liability to be used by our opponents.

In a defensive civil war, many, if not most, military operations have for their legitimate object the prevention of acts of hostility.

In case of foreign war, an act of Congress provides that to prevent hostilities by aliens they may be arrested.

In case of "Declared war between the United States and any foreign nation, or of any invasion or predatory incursion being *attempted* or *threatened* against any territory of the United States by any foreign government, and the President shall make public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States and not actually naturalized, shall be liable to be *apprehended, restrained, secured,* and *removed as alien enemies.*"

"Power over this subject is given to the President, having due regard to treaty stipulations by the act of the 6th of July, 1798; and by this act the President was

authorized to direct the *confinement* of *aliens*, although such confinement was not for the purpose of removing them from the United States, and means were conferred on him to enforce his orders, and it was not necessary that any judicial means should be called in to enforce the regulations of the President."*

Thus express power is given by statute to the President to make military arrests of innocent foreign-born persons under the circumstances above stated, for the purpose of preventing them from taking part in the contest.

While this ample authority is given to the commander-in-chief to arrest the persons of aliens residing here, as a precautionary measure, a *far greater power over the persons of our own citizens* is, for the same reason, given to the President in case of *public danger*.

RESTRAINT OF LIBERTY BY COMPULSORY MILITARY DUTY EXCEEDS TEMPORARY RESTRAINT BY ARREST.

To *prevent* hostilities in case of *threatened danger*, the President may call into service the army and navy of the United States and the militia, and thereby *subject* vast numbers of citizens to *military duty* under all the severity of martial law, whereby they are required to act under restraints more severe, and to incur dangers more formidable than any mere *arrest* and detention in a safe place for a limited time.

The law of Congress (1795) provides that the army may be called into actual service not only in cases of actual *invasion*, but when there is *danger* of *invasion*. Such is the power of the President under the Constitu-

* Lochington *vs.* Smith, Peters Cl. 406.

tion, as interpreted by the Supreme Court of the United States in the case of Martin *vs.* Mott, 12 *Wheaton R.* 28.

The President of the United States is the sole arbiter of the question whether such danger exists, and he alone can call into action the proper force to meet the danger.

He alone is the judge as to *where the* danger is, and he has a right to place his troops *there*, in whatever State or Territory that danger is apprehended. He may issue orders to his army to take such military measures as may, in his judgment, be necessary for public safety; whether these measures require the destruction of public or private property, *the arrest or capture of persons*, or other speedy and effectual military operations, sanctioned by the laws of war.

Such are the principles settled in Martin *vs.* Mott,* and reaffirmed in Luther *vs.* Borden,† where, in a civil war *in a State*, the *apprehension of danger*, and the right to use military power to *prevent* it, and to restrain the public enemy, are held to justify the violation of rights of person and property, invariably held sacred and inviolable in time of peace.

MILITARY ARRESTS MADE BY ALL GOVERNMENTS IN CIVIL WAR.

Capture of prisoners, seizures of property, are, all over the world, among the familiar proceedings of belligerents. No existing government has ever hesitated, while civil war was raging, to make military arrests. Nor could warlike operations be successfully conducted without a frequest use of the power to take and restrain hostile persons. Such is the lesson taught by the history of

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* 12 Wheaton's Reports, page 28.

† 8 Howard's Reports, page 1.

England and France. While the laws of war place in the hands of military commanders the power to capture, arrest, and imprison the army of the enemy, it would be unreasonable not to authorize them to capture a hostile individual, when his going at large would endanger the success of military operations. To carry on war with no right to seize and hold prisoners would be as impracticable as to carry on the administration of criminal with no right to ~~law~~ arrest and imprison culprits.

PECULIAR NECESSITIES OF CIVIL WAR.

In foreign wars, where the belligerents are separated by territorial boundaries, or by difference of language, there is little difficulty in distinguishing friend from foe. But in civil war, those who are now antagonists but yesterday walked in the same paths, gathered around the same fireside, worshipped at the same altar; there is no means of separating friend from foe, except by the single test of loyalty, or hostility to the government.

MARKS OF HOSTILITY.

It is a sentiment of hostility which in time of war seeks to overthrow the government, to cripple its powers of self-defence, to destroy or depreciate its resources, to undermine confidence in its capacity or its integrity, to diminish, demoralize, or destroy its armies, to break down confidence in those who are intrusted with its military operations in the field.

He is a public enemy who seeks falsely to exalt the motives, character, and capacity of armed traitors, to magnify their resources, to encourage their efforts by sowing dissensions at home, and inviting intervention of

foreign powers in our affairs, by overrating the success, increasing the confidence, and strengthening the hopes of our adversary, and by underrating, diminishing, and weakening our own, seeking false causes of complaint against our government and its officers, sowing seeds of dissension and party spirit among ourselves, and by many other ways giving aid and comfort to the enemy—aid more valuable to them than many regiments of soldiers or many millions of dollars.

All these ways and means of aiding a public enemy ought to be prevented or punished. But the connexions between citizens residing in different sections of the country are so intimate, the divisions of opinion on political or military questions are so numerous, the balance of affection, of interest, and of loyalty is so nice in many instances that civil war, like that which darkens the United States, is fraught with peculiar dangers, requires unusual precautions, and warrants and demands the most thorough and unhesitating measures for preventing acts of hostility, and for the security of public safety.

WHO OUGHT AND WHO OUGHT NOT TO BE ARRESTED.

All persons who *act* as public enemies, and all who by word or deed give reasonable cause to believe that they *intend* to act as such, may lawfully be arrested and detained by military authority for the purpose of preventing the consequences of their acts.

No person in loyal States can rightfully be captured or detained unless he has engaged, or there is reasonable cause to believe he intends to engage, in acts of hostility to the United States—that is to say, in acts which may tend to impede or embarrass the United States in

such military proceedings as the commander-in-chief may see fit to institute.

INSTANCES OF ACTS OF HOSTILITY.

Among hostile proceedings, in addition to those already suggested, and which justify military arrests, may be mentioned contraband trade with hostile districts or commercial intercourse with them, forbidden by statutes or by military orders;* aiding the enemy by furnishing them with information which may be useful to them; correspondence with foreign authorities with a view to impede or unfavorably affect the negotiations or interests of the government;† enticing soldiers or sailors to desertion; prevention of enlistments; obstruction to officers whose duty it is to ascertain the names of persons liable to do military duty, and to enrol them; resistance to the draft, to the organization or to the movements of soldiers; aiding or assisting persons to escape from their military duty, by concealing them in the country or transporting them away from it.

NECESSITY OF POWER TO ARREST THOSE WHO RESIST DRAFT.

The creation and organization of an army is the foundation of all power to suppress rebellion or repel invasion, to execute the laws, and to support the Constitution when they are assailed.

Without the power to capture or arrest those who oppose the draft no army can be raised. The necessity of such arrests is recognized by Congress in the 75th chapter of the act of March 3, 1863, for "*enrolling the forces of the United States, and for other purposes,*" which pro-

* See acts June 13, 1861; May 20, 1862, and March 12, 1863.

† See act February 12, 1863, ch. 60.

vides for the *arrest* and punishment of those who oppose the draft. This provision is an essential part of the general system for raising an army embodied in that statute.

Those citizens who are secretly hostile to the Union may attempt to prevent the board of enrolment from proceeding with the draft, or may refuse, when drafted, to enter the service.

Military power is called on to aid the proceedings by which the army is created. If the judiciary only is relied on, then raising the army must depend at last on the physical force which the judiciary can bring forward to enforce its mandates; and so, if the *posse comitatus* is not able to overpower those opposed to draft, the draft cannot be made according to law. If the draft is generally resisted in any locality, as it may be, no draft can be made, no law enforced, except mob law and lynch law, unless military power is lawfully applied to arrest the criminals.

If the power to raise an army is denied, the government will be broken down; and because we are too anxious to secure the supposed rights of certain individuals, all our rights will be trampled under foot.

TERRITORIAL EXTENT OF MARTIAL AND MILITARY LAW.

It is said that martial law must be confined to the immediate field of action of the contending armies, while in other and remote districts the martial law is not in force. Let us see the difficulty of this view.

Is martial law to be enforced only where the movements of our enemy may carry it?

Do we lose our military control of a district when the enemy have passed through and beyond it?

Is there no martial law between the base of opera-

tions of our army and the enemy's lines, even though it be a thousand miles from one to the other?

Must there be two armies close to each other to introduce martial law?

Is it not enough that there is one army in a locality to enforce the law?

If a regiment is encamped, is there not within its lines martial law?

If a single file of soldiers is present under a commanding officer, is it not the same?

Where must the enemy be to authorize martial law?

Suppose the enemy is an army, a regiment, or a single man; yet, be the number of persons more or less, it is still the enemy.

Who is the enemy? Whoever makes war.

Who makes war? Whoever aids and comforts the enemy. He commits treason. He makes war.

A raid into a northern State with arms is no more an act of hostility than a conspiracy to aid the enemy in the northern States by northern men.

All drafts of soldiers are made in places remote from the field of conflict. If no arrest can be made there, then the formation of the army can be prevented.

Can a spy be arrested by martial law? There was no law of the United States against spies outside of camps. There was nothing but martial law against them. A spy from the rebel army no one could doubt should be arrested. Why should not a spy from the northern States be arrested?

Thus it is obvious that the President, if deprived of the power to seize or capture the enemy, wherever they may be found, whether remote from the field of hostil-

ities or near to it, cannot effectually suppress the rebellion.

Where is the limit to which the military power of the commander of the army must be confined in making war against the enemy? Wherever military operations are actually extended, there is martial law.

Whenever a person is helping the enemy, then he may be taken as an enemy; whenever a capture is made, there war is going on, there martial law is inaugurated, so far as that capture is concerned.

Stonewall Jackson, it is said, visited Baltimore a few months' since in disguise. While there, it is not known that he committed any breach of the laws of Maryland or of the United States. Could he not have been captured, if he had been caught, by the order of the President? If captured, could the State court of Maryland have ordered him to be surrendered to its judge, and so turned loose again?

HABEAS CORPUS.

The military or executive power to prevent prisoners of war from being subject to discharge by civil tribunals, or, in other words, the power to suspend as to these prisoners the privilege of *habeas corpus*, is an essential means of suppressing the rebellion and providing for the public safety, and is therefore, by necessary implication, conferred by the Constitution on that department of government to which belongs the duty of suppressing rebellion by force of arms in time of war. In times of civil war or rebellion it is the duty of the President to call out the army and navy to suppress it. To use the army effectually for that purpose it is essential that the commanders should have the power of retaining in their control all persons captured and held in prison.

It must be presumed that the powers necessary to execute the duties of the President are conferred on him by the Constitution. Hence he must have the power to hold whatever persons he has a right to capture without interference of courts during the war, and he has the right to capture all persons who he has reasonable cause to believe are hostile to the Union, and are engaged in hostile acts. The power is to be exercised in emergencies. It is to be used suddenly. The facts on which public safety in time of civil war depends can be known only to the military men, and not to the legislatures in any special case. To pass a law as to each prisoner's case, whenever public safety required the privilege of the writ to be suspended, would be impracticable.

Shall there be no power to suspend the writ as to any single person in all the northern States unless Congress pass a law depriving all persons of that privilege?

Oftentimes the exposure of the facts and circumstances requiring the suspension in one case would be injurious to the public service by betraying our secrets to the enemy. Few acts of hostility are more dangerous to public safety, none require a more severe treatment, either to prevent or to punish it, than any attempt to interfere with the formation of the army by preventing enlistments, by procuring desertions, or by aiding and assisting persons liable to do military duty in escaping from the performance of it. Military arrest and confinement in prison during the war is but a light punishment for a crime which, if successful, would place the country in the power of its enemies, and sacrifice the lives of soldiers now in the field for want of support.

Whoever breaks up the fountain head of the army strikes at the heart of the country.

All those proceedings which tend to break down the army when in the field, or to prevent or impede any step necessary to be taken to collect and organize it, are acts of hostility to the country, and tend directly to impede the military operations on which the preservation of the government now in time of war depends. All persons who commit such acts of hostility are liable to military arrest and detention; and if they are at the same time liable to be proceeded against for violation of municipal laws, that liability cannot shelter them from responsibility to be treated as public enemies arrested and detained so as to prevent them from perpetrating any act of hostility.

In determining the character of acts in the free States committed by persons known to be opposed to the war, it must be borne in mind that those who in the loyal States aid and comfort the enemy are partakers in the crime of rebellion as essentially as if present with rebel armies. They are in law *particeps criminis* Though their overt acts, taken alone and without connection with the rebellion might not amount to treason, or to any crime, yet, uder the circumstances, many of these acts, otherwise innocent, become dangerous, injurious and criminal.

A person who by his mere presence lends support and gives confidence to a murderer while perpetrating his foul crime, is sharer in that crime, whether he is at the time of the murder in actual presence of his victim, or stands off at a distance, and is ready to warn the cutthroat of the approach of danger. Such was the rule administered in the trial of Knapp for murdering a citi-

zen of Massachusetts. This is familiar law. What difference does it make whether the conspirator is near or far away from his associates; whether he is in a slave or a free State? The real question is whether the person accused has given or means to give aid or comfort to the enemy of his country, whether near by or far off; if so, then he is an enemy, and may be captured on the door steps of a court-house, or even on the bench itself.

CONSTITUTIONALITY OF THE ENROLMENT ACT OF MARCH 3, 1863.

No power to arrest or detain prisoners can be conferred upon the President or his provost marshals by an act of Congress which is void for being unconstitutional. No person can be civilly or criminally liable to imprisonment for violation of a void statute. Hence the question may arise whether the enrolment act is a legitimate exercise by Congress of powers conferred upon it by the Constitution.

That Congress has full power to pass the enrolment act is beyond reasonable doubt, as will be apparent from the following references:

The Constitution, article 1, section 8, clause 12, gives to Congress the power "to raise and support armies."

It must be observed that the *Constitution* recognizes a clear distinction between the "*army of the United States*" and the "*militia*" of the several States, even when called into actual service. Thus, by article 2, section 2, clause 1, "The President shall be commander-in-chief of the *army* and navy of the United States, *and of the militia* of the several States, when called into actual service of the United States."

By article 1, section 8, clause 15, "Congress shall

have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

By article 1, section 8, clause 16, Congress shall have power "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

In addition to these powers of Congress to call into the service of the Union the militia of the States by requisitions upon the respective governors thereof, the Constitution confers upon Congress another distinct, independent power, by article 1, section 8, clause 12, which provides "That Congress shall *have power to raise and support armies;* but no appropriation for that use shall be for a longer term than two years."

By article 1, section 8, clause 14, Congress shall have power to make rules for the government and regulation of the land and naval forces.

The statutes of 1795, and other recent acts of 1861 and 1862, authorizing the enlistment of volunteers, were mainly founded on the power to receive militia of the States into the service of the Union, and troops were raised principally through the agency of governors of States.

But the enrolment act of 1863 is an exercise of power conferred upon Congress, to " raise and support armies," and not of the power to call out the militia of the States. Neither the governors nor other State authorities have any official functions to perform in relation to this act, nor any right to interfere with it. It is an act of the

United States, to be administered by United States officers, applicable to citizens of the United States in the same way as all other national laws.

The confounding of these separate powers of Congress and the rights and proceedings derived from them has been a prolific source of error and misapprehension.

Article 1, section 8, clause 13, gives Congress power "to make rules for the government and regulation of the land and naval forces."

Article 1, section 8, clause 18, gives Congress power "to pass all laws which shall be necessary and proper for carrying into effect the foregoing powers and all other powers vested by this Constitution in the government or in any *department* or *officer thereof*."

RULES OF INTERPRETATION AND THEIR APPLICATION TO THIS ACT.

The Constitution provides that Congress shall have power to pass "all laws necessary and proper" for carrying into execution all the powers granted to the government of the United States, or any department or officer thereof. The word "necessary," as used, is not limited by the additional word "proper," but enlarged thereby.

"If the word *necessary* were used in the strict, rigorous sense, it would be an extraordinary departure from the usual course of the human mind, as exhibited in solemn instruments, to add another word, the only possible effect of which is to qualify that strict and rigorous meaning, and to present clearly the idea of a choice of means in the course of legislation. If no means are to be resorted to but such as are *indispensably* necessary, there can be neither sense nor utility in adding the word '*proper*,' for the *indispensable necessity* would shut out from view all consideration of the *propriety* of the means."

Alexander Hamilton says—

"The authorities essential to the care of the common defence are these: To raise armies; to build and equip fleets; to prescribe rules

for the government of both; to direct their operations; to provide for their support. These powers ought to exist WITHOUT LIMITATION because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means necessary to satisfy them. The circumstances which endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. * * * This power ought to be under the direction of the same councils which are appointed to preside over the *common defence.* * * * It must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defence and protection of the community in any matter essential to its efficacy—that is, in any matter essential to the *formation, direction,* or *support* of the NATIONAL FORCES."

This statement, Hamilton says—

"Rests upon two axioms, simple as they are universal: the *means* ought to be proportioned to the *end;* the persons from whose agency the attainment of the *end* is expected ought to possess the *means* by which it is to be attained."

The doctrine of the Supreme Court of the United States, announced by Chief Justice Marshall, and approved by Daniel Webster, Chancellor Kent, and Judge Story, is thus stated:

"The government of the United States is one of enumerated powers, and it can exercise only the powers granted to it; but though limited in its powers, it is supreme within its sphere of action. It is the government of the people of the United States, and emanated from them. Its powers were delegated by all, and it represents all, and acts for all.

"There is nothing in the Constitution which excludes *incidental* or *implied* powers. The articles of confederation gave nothing to the United States but what was expressly granted; but the new Constitution dropped the word *expressly,* and left the question whether a particular power was granted to depend on a fair construction of the whole instrument. No constitution can contain an accurate detail of all the subdivisions of its powers, and all the *means* by which they might be carried into execution. It would render it too prolix. Its nature requires that only the great outlines should be marked, and its

important objects designated, and all the minor ingredients left to be deduced from the nature of those objects. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, were intrusted to the general government; and a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the people vitally depended, must also be intrusted with *ample means of their execution.* Unless the words imperiously require it, we ought not to adopt a construction which would impute to the framers of the Constitution, when granting great powers for the public good, the intention of impeding their exercise by withholding a *choice of means.* The powers given to the government imply the ordinary means of execution; and the government, in all sound reason and fair interpretation, must have the choice of the means which it deems the most convenient and appropriate to the execution of the power. The Constitution has not left the right of Congress to employ the necessary means for the execution of its powers to general reasoning. Art. 1, sect. 8, of the Constitution expressly confers on Congress the power 'to make all laws that may be necessary and proper to carry into execution the foregoing powers.'

Congress may employ such means and pass such laws as it may deem necessary to carry into execution great powers granted by the Constitution; and *necessary* means, in the sense of the Constitution, does not import an absolute physical necessity so strong that one thing cannot exist without the other. It stands for any means calculated to produce the end. The word *necessary* admits of all degrees of comparison. A thing may be necessary, or very necessary, or absolutely or indispensably necessary. The word is used in various senses, and in its construction the subject, the context, the intention, are all to be taken into view. The powers of the government were given for the welfare of the nation. They were intended to endure for ages to come, and to be adapted to the various *crises* in human affairs. To prescribe the specific means by which government should in all future time execute its power, and to confine the choice of means to such narrow limits as should not leave it in the power of Congress to adopt any which might be appropriate and conducive to the end, would be most unwise and pernicious, because it would be an attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been foreseen dimly, and would deprive the legislature of the capacity to avail itself of experience, or to ex-

ercise its reason, and accommodate its legislation to circumstances. If the end be legitimate, and within the scope of the Constitution, all means which are appropriate, and plainly adapted to this end, and which are not prohibited by the Constitution, are lawful."*

Under the power of Congress to pass all laws necessary and proper to raise and support armies the only question is, whether the act of Congress is "plainly adapted to the end proposed," namely, "*to raise an army.*" If it is a usual mode of raising an army to enrol and draft citizens, or, if unusual, it is *one appropriate mode* by which the end may be accomplished, it is within the power of Congress to pass the law. Congress, having the power to raise an army, has an unlimited choice of "means" appropriate for carrying that power into execution.

In a republic, the country has a right to the military service of every citizen and subject. The government is a government of the people, and for the safety of the people. No man who enjoys its protection can lawfully escape his share of public burdens and duties. *Public safety* and *welfare* in time of war depend wholly upon the success of *military* operations. Whatever stands in the way of military success must be sacrificed, else all is lost. The triumph of arms is the *tabula in naufragio*, the last plank in the shipwreck, on which alone our chance of national life depends. *Hence*, in the struggle of a great people for *existence*, private rights, though not to be disregarded, become comparatively insignificant, and are held subject to the paramount rights of the community. The life of the nation must be preserved at all hazards, and the Constitution must not, without im-

* On the interpretation of constitutional power, see 1 Kent's Com., 351, 352, *McCulloch* v. *The State of Maryland*, 4 Wheat. R., 413—420.

perative necessity, be so construed as to deprive the people of the amplest means of self-defence.

Every attempt to fetter the power of Congress in calling into the field the military forces of the country in time of war is only a denial of the people's right to fight *in their own defence.*

If a foreign enemy were now to invade the country, who would dare to cavil at the forms of statutes whereby the people sought to organize the army to repel the invader? It must not be forgotten that Congress has the same power to-day to raise and organize armies to suppress rebellion that would belong to it if the Union were called upon to meet the world in arms.

INDEMNITY TO PERSONS ARRESTED.

Persons who reside in a country engaged in active hostilities and who so conduct themselves as to give reasonable cause to believe that they are aiding and comforting a public enemy, or that they are participating in any of those proceedings which tend to embarrass military operations, may be arrested; and if such persons shall be *arrested* and imprisoned for the purpose of punishing or preventing such acts of hostility, they are not entitled to claim indemnity for the injury to themselves or to their property, suffered by reason of such arrest and imprisonment.

If the persons so arrested be subjects of a foreign government, they cannot lawfully claim indemnity, because their own hostile conduct, while it has deprived them of the shelter of "neutrality," has subjected them to penalties for having violated the laws of war.

If a foreigner join the rebels, he exposes himself to the treatment of rebels. He can claim of this government no indemnity for wounds received in battle, or for

loss of time or suffering by being captured and imprisoned. It can make no difference whether his acts of hostility to the United States are committed in open contest under a rebel flag, or in the loyal States, where his enmity is most dangerous. If it be said that he has violated no municipal law, and therefore ought not to be deprived of liberty without indemnity, it must be remembered that if he has violated any of the laws of war he may have thereby committed an offence more dangerous to the country and more destructive in its consequences than any crime defined in statutes.

If a person, detained in custody in consequence of having violated the laws of war and for the purpose of *preventing* hostilities, be liberated from confinement without having been *indicted* by a grand jury, it does not follow therefrom that he has committed no crime. He may have been guilty of grave offences, while the government may not have deemed it necessary to prosecute him. Clemency and forbearance are not a just foundation for a claim of indemnity. An offender may not have been indicted, because the crime committed, being purely a military crime, or crime against martial law; may not have come within the jurisdiction of civil tribunals.

In such a case the arrest and imprisonment, founded on martial law, justified by military necessity, cannot be adjudicated by civil tribunals.

If the person so arrested be the subject of a foreign power, and claims exemption from arrest and custody for that reason, he can have no right to indemnity under any circumstances, by reason of being an alien, until such fact of alienage is made known to the government. His claim to indemnity thereafter will depend on a just application of the principles already stated.

APPENDIX.

Instructions of the War Department to Officers having Charge of Deserters.

WAR DEPARTMENT,
PROVOST MARSHAL GENERAL'S OFFICE,
Washington, D. C., July 1, 1863.

[CIRCULAR No. 36.]

The following opinion of Hon. William Whiting, Solicitor of the War Department, is published for the information and guidance of all officers of this Bureau:

ARREST OF DESERTERS—HABEAS CORPUS.

Opinion.

[redacted] the 7th section of the act approved March 3, 1863, [redacted] for enrolling and calling out the national forces, and [redacted] other purposes," that it shall be the duty of the Provost Marshals appointed under this act "to arrest *all deserters, whether regulars, volunteers, militia men, or persons called into the service under this or any other act of Congress*, wherever they may be found, and to send them to the nearest military commander, or military post."

If a writ of *habeas corpus* shall be issued by a State court, and served upon the Provost Marshal while he holds under arrest a deserter, before he has had opportunity "to send him to the nearest military commander, or military post," the Provost Marshal is not at liberty to disregard that process. "It is the duty of the Marshal, or other person having custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. But after this return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further.

"They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any other process issued under State authority, can pass

over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the Marshal, or other person holding him, to make known, by a proper return, the authority under which he retains him, it is, at the same time, imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And, consequently, it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court, upon a *habeas corpus* issued under State authority. No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the Marshal, or other authorized officer or agent of the United States, in any respect in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. 'No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.'"

The language above cited is that of Chief Justice Taney in the decision of the Supreme Court of the United States in the case of Alderman *vs.* Booth.—(21 Howard's Reports.)

If a writ of *habeas corpus* shall have been sued out from a State court, and served upon the Provost Marshal while he holds the deserter under arrest, and before he has had time or opportunity to "send him to the nearest military commander, or military post," it is the duty of the Marshal to make to the court a respectful statement, in writing, as a return upon the writ, setting forth:

1st. That the respondent is Provost Marshal, duly appointed by the President of the United States, in accordance with the provisions of the act aforesaid.

2d. That the person held was arrested by said Marshal as a

deserter, in accordance with the provision of the 7th section of the act aforesaid. That it is the legal duty of the respondent to deliver over said deserter "to the nearest military commander, or military post," and that the respondent intends to perform such duty as soon as possible.

3d. That the production of said deserter in court would be inconsistent with, and in violation of the duty of the respondent as Provost Marshal, and that the said deserter is now held under authority of the United States. For these reasons, and without intending any disrespect to the honorable judge who issued process, he declines to produce said deserter, or to subject him to the process of the court.

To the foregoing all other material facts may be added.

Such return having been made, the jurisdiction of the State court over that case ceases. If the State court shall proceed with the case and make any formal judgment in it, except that of dismissal, one of two courses must be taken. (1) The case may be carried up, by appeal or otherwise, to the highest court of the State, and removed therefrom by writ of error to the Supreme Court; or, (2) the [illegible] may be personally dealt with in accordance with law, and [illegible]ions as may hereafter be issued in each case.

WILLIAM WHITING,
Solicitor of the War Department.

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